Office - Supreme
FIL
MAR
ALEXANDER

No. 80-1199

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, ET AL.,
PETITIONERS
v.
JOHN PATTERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel

PHILIP B. SKLOVER
Acting Associate General Counsel

VELLA M. FINK
Associate General Counsel

WILLIAM H. NG
Attorney
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

QUESTION PRESENTED

Whether the district court abused its discretion u
Fed. R. Civ. P. 60(b)(5) in denying petitioners' moti
reopen that portion of a 1974 judgment concerning
tioners' discriminatory lines of employee progres
which were established after the effective date of Title V
the Civil Rights Act of 1964.

TABLE OF CONTENTS

Opinions below .....
Jurisdiction .....
Statutes and rule involved .....
Statement .....
Argument .....
Conclusion .....

TABLE OF AUTHORITIES

Cases:

Alexander v. *Aero Lodge No. 735*, 565 F. 2d 1364, cert. denied, 436 U.S. 946 .....

Browder v. *Director, Ill. Dept. of Corrections* 434 U.S. 257 .....

California Brewers Ass'n v. *Bryant*, 444 U.S. 598 .....

Columbus Board of Education v. *Penick*, 443 U.S. 449 .....

EEOC v. *Safeway Stores, Inc.*, 611 F. 2d 795, cert. denied, 446 U.S. 952 .....

Franks v. *Bowman Transportation Co.*, 424 U.S. 747 6

Fuhrman v. *Livaditis*, 611 F. 2d 203 .....

Griggs v. *Duke Power Co.*, 401 U.S. 424 ....

Hameed v. *International Ass'n of Bridge Workers, Local Union No. 396*, 637 F. 2d 506 .....

Cases—Continued:

Hazelwood School District v. *United*
433 U.S. 299 .....

International Brotherhood of Teamste
United States, 431 U.S. 324 .....

McDonnel-Douglas Corp. v. *Green*,
411 U.S. 792 .....

Nashville Gas Co. v. *Satty*, 434 U.S. 1

Sears v. *Atchison, Topeka & Santa Fe*
Nos. 78-1995, 78-1997, 78-1998 (10t
Mar. 11, 1981) .....

Swint v. *Pullman-Standard*, 624 F. 2d
525 .....

Trans World Airlines, Inc. v. *Hardiso*
432 U.S. 63 .....

United Air Lines, Inc. v. *Evans*,
431 U.S. 553 .....

United States v. *Georgia Power Co.*,
634 F. 2d 929 .....

United States v. *Swift & Co.*, 286 U.S.
106 .....

United Steelworkers v. *Weber*, 443 U.
193 .....

Statutes and rule:

Civil Rights Act of 1964, Title VII, 42
2000e *et seq.* .....
Section 703(a)(2), 42 U.S.C. 2000
Section 703(c)(2), 42 U.S.C. 2000
Section 703(h), 42 U.S.C.
2000e-2(h) 2, 5, 6,
Fed. R. Civ. P. 60(b)(5) .....

In the Supreme Court of the

OCTOBER TERM, 1980

No. 80-1199

THE AMERICAN TOBACCO COMP
PETITIONERS

v.

JOHN PATTERSON, ET A

ON PETITION FOR A WRIT OF CE
THE UNITED STATES COURT OF A
THE FOURTH CIRCUI

BRIEF FOR THE EQUAL EMPLOYMEN
COMMISSION IN OPPOSI

OPINIONS BELOW

The en banc decision of the court of a
634 F. 2d 744. Earlier decisions of the c
reported at 586 F. 2d 300 and 535 F. 2d 2
the district court are unofficially report
Prac. Cas. (BNA) 371, 11 Fair Emp. Pra
and 8 Fair Emp. Prac. Cas. (BNA) 778

JURISDICTION

The judgment of the court of appe
November 18, 1980. The petition for a w
filed on January 16, 1981. The jurisdict
invoked under 28 U.S.C. 1254(1).

Section 703(a)(2) of Title V
1964, 42 U.S.C. 2000e-2(a)(2),

> It shall be an unlawful e
> employer * * * to limit,
> employees * * * in any w
> tend to deprive any indivi
> tunities or otherwise adve
> employee, because of such
> sex * * *.

2. Section 703(c)(2) of Title
provides in relevant part:

> It shall be an unlawful emp
> organization * * * to limi
> membership or to classify
> employment any individu
> deprive or tend to deprive
> ment opportunities, or wo
> opportunities or otherwis
> as an employee or as an
> because of such individual

3. Section 703(h) of Title
provides in relevant part:

> Notwithstanding any o
> chapter, it shall not be an
> tice for an employer to a
> compensation, or differen
> leges of employment pursu
> * * * system, * * * provid
> not the result of an intentio
> race [or] sex * * *.

4. Rule 60(b)(5) of the Fede
provides in relevant part:

On motion and upon su
may relieve a party * * * f
or proceeding * * * [if] it
the judgment should have

STATE

In 1973, the Equal Employ
sion filed this employment d
United States District Court
Virginia, alleging that petition
practices had confined black
segregated jobs, in violation of
Act of 1964, 42 U.S.C. 2000e *e*
dated the Commission's suit v
action suit filed by responde
other black employees. Patters
charges of race discrimination
1969, with regard to petitio
cigarette and pipe tobacco ma
mond, Virginia.

In 1974, following an exte
entered a declaratory judgme
cluding that their promotions
lated Title VII. The court foun
two plants were expressly seg
and sex. Blacks were relegate
prefabrication departments an
visory positions and better pa
fabrication department. Like
from the better paying male
eliminated its overt segregati
company continued, however
promotions into the jobs fron
been excluded on an express b
the company accomplished thi
ardless, subjective evaluation

males. In 1968, petitione
system and established s
of progression required
level job in that line befo
the same line (8 Fair Em
(1974); 535 F. 2d 257, 2

The district court dete
and seniority practices h
of race and gender segr
the pattern established
overt discrimination. Th
enactment of Title VII, a
tively of the hourly-pa
plants' prefabrication de
1973, only men had be
production job classific
women had been employ
white males held virtua
the vast majority of fab
Empl. Prac. Cas. (BNA
270-272). Concluding th
petuated past race and
business necessity, the c
tinuing to use the lines
Cas. (BNA) at 790; 535

2. On an initial app
affirmed the district cou
exceptions regarding th
district court's decree.
"record amply supports
the effective date of Tit
the[ir] promotional pol
lar, the court of appeals
discriminatory evaluati

failure to provide definit
sary and discriminatory
ture of accrued seniority
one plant to the other a
263-265. The court rema
pay proceedings. See 18
(1977). Thereafter, this
tion for a writ of certior

3. Subsequently, whil
petitioners filed a motio
judgment.[1] Relying o
Teamsters v. *United St*
United States Air Lines,
and *Hazelwood School*
299 (1977), petitioners a
seniority systems, includ
not violate Title VII. Th
stating that petitioners'
system * * * is not a b
* * * because this syste
trial in a discriminatory
natory genesis" (18 Fai
Hence, the court decline

4. Thereafter, a pane
"*Teamsters* require[s]
approved with regard to
sion * * * or supervisо
303 (1978)). The court
practices are not part o
system and thus do no
Section 703(h). The cou

---

[1]Petitioner did not identi
below treated petitioners' ap
of the Federal Rules of Civil

further findin
petitioners' se
The court obs
court that [pet
fide if it eithe
purpose or wa
criminatory pu
ing the inter-p
quately suppo

The court o
case. The en
application to
whether or nc
[because][t]hi
when Title VI
of appeals con
as exhaustivel
ters and *Fran*
747 (1976), con
the immunity
only to those s
effective date,
such systems"
gression were
pre-Act vested
turb this aspe

Petitioners
reopen that re

---

[2]The en banc c
ings regarding th
promotional pra
13-20). These iss

against petitio
gression." In
the court of a
Title VII of th
2(h), and that
established aft
minimum, pe
effects of prio
settled, howev
discretion und
whether a pri
extreme hardsh
tor, Ill. Dep't
United States
EEOC v. *Safe*
1979), cert. de
tis, 611 F. 2d 2
occurred here.

1. Even ass
progression fa
petitioners are
petitioners co

---

[1]The panel of t
progression are n
ers' lines of progr
not obtain a high
served at least on
same line of pro
employees with g
and it discriminat
have worked at e
lower job in the sa
the lines of progr
employment righ
employment incr
598, 606 (1980).
703(h) applies sol
date of the Act.

only "bona fide" seniority systems that are not the products of intentional discrimination. Thus, in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court emphasized that "§703(h) does not immunize all seniority systems" (431 U.S. at 353), but rather applies only to a "bona fide" system that does "not have its genesis in racial discrimination [and that has been] negotiated * * * and maintained free from any illegal purpose" (*id.* at 356). See, *e.g.*, *Hameed* v. *International Ass'n of Bridge Workers, Local Union No. 396*, 637 F. 2d 506, 516 & n.11 (8th Cir. 1980); *Swint* v. *Pullman-Standard*, 624 F. 2d 525, 530 (5th Cir. 1980); *Sears* v. *Atchison, Topeka & Santa Fe Ry.*, Nos. 78-1995, 78-1997, 78-1998 (10th Cir. Mar. 11, 1981).

Here, the record demonstrates that petitioners' lines of progression have their origin in overt discrimination and were part of an array of discriminatory job practices designed to confine blacks and women to lower paying, segregated jobs. See 18 Fair Empl. Prac. Cas. (BNA) at 277; 535 F. 2d at 263-264; 8 Fair Empl. Prac. Cas. (BNA) at 789-795. Prior to 1963, petitioners "overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances." 535 F. 2d at 263. Indeed, different locals of the same union represented black and white employees. Likewise, petitioners also overtly discriminated on the basis of gender at that time. Moreover, between 1963 and 1968, petitioners maintained this segregation through means of unposted job vacancies and unwritten, subjective and arbitrary job rules administered by white male supervisors. *Ibid.* Finally, in 1968, after the effective date of the Act, petitioners established lines of progression without a business justification and without definite written job descriptions, which predictably resulted in perpetuating the pattern of job segregation that had been created by petitioners' overt discrimination in the past. See 8 Fair Empl. Prac. Cas. (BNA) at 789-795; 535 F. 2d at 264.

In these circumstances, the district court properly concluded that petitioners' lines of progression are not bona fide seniority systems. See *Teamsters, supra*, 431 U.S. at 353, 356; *United States* v. *Georgia Power Co.*, 634 F. 2d 929 (5th Cir. 1981); *Swint* v. *Pullman-Standard, supra*, 624 F. 2d at 530-534. See also *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979) ("adherence to a particular policy or practice, 'with full knowledge of the predictable effect of such adherence upon racial imbalance * * * is one factor * * * which may be considered by a court in determining whether an inference of segregative intent should be drawn' "). Because petitioners' lines of progression thus do not fall within the scope of Section 703(h) and because those lines of progression do not serve any business need or other important interest of petitioners, the district court correctly declined to reopen this relatively limited aspect of the 1974 judgment.

2. Furthermore, the court of appeals correctly held that Section 703(h) affords no immunity to the post-Act creation of the lines of progression at issue here, even if they are regarded as a "seniority system" within the meaning of that Section. Section 703(h) provides a limited exception to the discriminatory impact provisions of Title VII for the operation of certain "bona fide seniority * * * system[s]." On its face, however, Section 703(h) neither defines "bona fide" seniority systems nor purports to sanction the post-Act establishment of seniority systems that unlawfully "operate to 'freeze' the status quo of prior discriminatory practices" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971)). To the contrary, as this Court concluded in *International Brotherhood of Teamsters* v. *United States, supra*, after exhaustive analysis of the language and legislative history of Section 703(h), that provision reflects "the congressional judgment * * * that Title VII should not outlaw the use of *existing seniority lists* and thereby destroy or water down

the *vested seniority rights* of employees simply because the employer had engaged in discrimination prior to the passage of the Act" (431 U.S. at 353 (emphasis supplied)).[4]

Indeed, the legislative history makes clear that Section 703(h) represents a congressional compromise designed to resolve "ambiguities concern[ing] Title VII's impact on *existing* collectively bargained seniority rights * * * [b]allow[ing] for full exercise of *seniority accumulated before the effective date of the Act.*" *Teamsters, supra*, 431 U.S.

---

[4] *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), on which petitioners rely (Pet. 16-17), is not to the contrary. In *Evans*, the Court considered a seniority system that had been established prior to the effective date of Title VII, whereas the alleged seniority system challenged in this case was created after the effective date of the Act. Moreover, the *Evans* decision held only that a pre-Act seniority system which was not itself unlawful, does not violate Title VII merely because it perpetuates post-Act discrimination that the plaintiff had failed to challenge in a timely fashion. Although the Court stated that Section 703(h) applies to seniority *decisions* made after the effective date of the Act in accordance with *pre-Act* seniority *systems* (431 U.S. at 560), it did not suggest that Section 703(h) immunizes the post-Act creation of seniority systems that perpetuate the effects of post-Act discrimination. Rather, the Court emphasized that the seniority system at issue in *Evans* did not discriminate between men and women (431 U.S. at 557-558 n. 10), and that Section 703(h) "does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory" (431 U.S. at 560).

Likewise, petitioners erroneously rely on *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), and *California Brewers Ass'n* v. *Bryant, supra*. Those cases did not concern a seniority system established after the effective date of the Act and did not address the issue presented by this case. Likewise, there is no conflict between the decision below and the decisions in *Hameed* v. *International Ass'n of Bridge Workers Local Union No. 396, supra*, and *Alexander* v. *Aero Lodge No. 735*, 565 F. 2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). Not only did those cases not address whether Section 703(h) covers seniority systems created after the effective date of the Act, but the Sixth and Eighth Circuits emphasized that Section 703(h) does not in any event immunize a seniority system "established or maintained with an intent to discriminate" 565 F. 2d at 1378; see *Hameed, supra*, 537 F. 2d at 5

352 (emphasis supplied). In *Franks* v. *Bowman Transpor tation Co.*, 424 U.S. 747, 759-761 (1976), the Court sum marized the pertinent legislative history as follows (empha sis supplied; footnotes omitted):

> The initial bill reported by the House Judiciary Com mittee as H.R. 7152 and passed by the full House o February 10, 1964, did not contain §703(h). Neither th House bill nor the majority Judiciary Committe Report even mentioned the problem of seniority. Tha subject thereafter surfaced during the debate of the bi in the Senate. This debate prompted Senators Clar and Case to respond to criticism that Title VII woul destroy *existing seniority systems* by placing an inter pretive memorandum in the Congressional Record The memorandum stated: "*Title VII would have n effect on established seniority rights. Its effect is pros pective.*" Senator Clark also placed in the Congres sional Record a Justice Department statement con cerning Title VII which stated "[I]t has been asserte that Title VII would undermine vested rights of senior ity. This is not correct. *Title VII would have no effec on seniority rights existing at the time it takes effect* Several weeks thereafter, following several informa conferences among the Senate leadership, the Hous leadership, the Attorney General and others * * * compromise substitute bill prepared by Senators Mans field and Dirksen, Senate majority and minority lead ers respectively, containing §703(h) was introduced o the Senate floor. Although the Mansfield-Dirkse substitute bill, and hence §703(h), was not the subjec of a committee report, * * * Senator Humphrey, on of the informal conferees, later stated during debate o the substitute that *§703(h) was not designed to alter th meaning of Title VII generally but rather "merely clari fies its present intent and effect.*"

Hence, nothing in the language or legislative
Section 703(h) suggests that Congress intended
the protection accorded seniority systems exis
time of the enactment of Title VII to the post-
creation of seniority systems that constitute "arl
unnecessary barriers [which] operate invidiously
inate." *Griggs* v. *Duke Power Co., supra*, 401 U
Petitioners' unwarranted interpretation of Sect
would upset the balance, established by Congres
legitimate pre-Act seniority expectations and
overriding goal of eliminating discrimination. Se
ted Steelworkers v. *Weber*, 443 U.S. 193, 200-2
Franks v. *Bowman Transportation Co., supra*, 4
774-779 (seniority expectations do not justify den
to the victims of unlawful discrimination).[5]

In sum, the court of appeals correctly concl
Section 703(h) was not meant to encourage the
seniority systems that " 'freeze' the status quo o
criminatory practices" (*Griggs* v. *Duke Power*
401 U.S. at 430), thereby defeating the congress
pose underlying Title VII to eliminate "practice
ces which have fostered racially stratified job env
* * * ." *McDonnell-Douglas Corp.* v. *Green*, 41

---

[5]Petitioners suggest (Pet. 9-10) that the decision below
how affect the ability of employers and unions to mod
systems for the purpose of affirmative action or to respond
the economy or industry. But it is well settled that employe
may "voluntarily * * * modify a seniority system to the
liorating the effects of the past * * * discrimination." *Fr*
man Transportation Co., supra, 424 U.S. at 779. See
workers v. *Weber, supra*. Likewise, Title VII does
employment practices either that are required by business
that do not intentionally or effectively discriminate on the
or other impermissible classifications. See, *e.g., Griggs* v.
Co., supra, 401 U.S. at 431; *Nashville Gas Co.* v. *Satty*, 4
143 (1977).

800 (1973). That decision is consistent with the de
this Court construing Section 703(h), and does n
with any decision of any court of appeals. N
because the lines of progression at issue here
perpetuate the effects of post-Act discriminatory
the decision below was correct even if Section 703
arguably be thought to afford a measure of protect
post-Act creation of seniority systems in other ci
ces. Particularly in light of the collateral nature o
ers' Rule 60(b)(5) challenge and the strong ev
purposeful discrimination concerning petitioner
progression, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel

PHILIP B. SKLOVER
Acting Associate General Counsel

VELLA M. FINK
Assistant General Counsel

WILLIAM H. NG
Attorney
Equal Employment Opportunity Commission

MARCH 1981

DOJ-1981-03